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February 27, 2001

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Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: Federal-State Joint Board on Universal Service,
CC Docket No. 96-45 /
Western Wireless Corp. Petition for Designation as an
Eligible Telecommunications Carrier in Wyoming

Dear Ms. Salas:

On behalf of Western Wireless Corporation and its wholly-owned subsidiary, WWC Holding Co., Inc. (collectively, "Western Wireless"), I am submitting the Western Wireless Opposition to Petitions for Reconsideration in the above-referenced proceeding. This Opposition is filed pursuant to the Public Notice, 66 Fed. Reg. 9849 (Feb. 12, 2001).

If you have any questions, please contact me.

Respectfully submitted,



David L. Sieradzki
Counsel for Western Wireless

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Federal-State Joint Board on Universal Service) CC Docket No. 96-45 /
)
Western Wireless Corporation Petition for)
Designation as an Eligible Telecommunications)
Carrier in the State of Wyoming)

**WESTERN WIRELESS OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

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February 27, 2001

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EXECUTIVE SUMMARY

The petitions for reconsideration of the Common Carrier Bureau's order designating Western Wireless Corporation's wholly-owned subsidiary, WWC Holding Co., Inc. ("Western Wireless"), as an eligible telecommunications carrier ("ETC") in the state of Wyoming should be denied. The procedural and substantive arguments in the reconsideration petitions have no basis in law or fact.

The Petitioners' arguments that they lacked a fair opportunity to comment on the inclusion of their study areas in Western Wireless' ETC grant, or on Western Wireless designation as an ETC in the Wyoming portions of rural incumbent local exchange carrier ("ILEC") study areas that cross the Wyoming border, lack merit. There has been a year-long state proceeding, and a protracted FCC proceeding in which the Commission issued an order accepting jurisdiction and instructed the Bureau to resolve the merits, which it did at the end of the allotted six months. The Petitioners and/or trade associations acting on their behalf participated at all these phases of the proceedings, and the Bureau's order was both a proper exercise of its delegated authority and a logical outgrowth of Western Wireless' petitions and the state and federal proceedings. As such, the Petitioners had ample opportunities to tender the substantive arguments and "empirical evidence" that they now, improperly, offer for the first time on reconsideration. Moreover, the Bureau properly decided Western Wireless' ETC petition for Wyoming in the six months allotted by the full Commission, rather than delaying indefinitely based on the prospect that the Wyoming legislature might, at some point, grant its state commission authority to designate wireless carriers as ETCs.

The Petitioners' substantive arguments are equally unavailing. First, their proffer of what they characterize as "empirical evidence" regarding the public interest in designating an additional ETC in rural ILEC study areas amounts to little more than dressed up assertions that rural areas cannot support competition. The Commission and the courts have already rejected this proposition, and Petitioners offer no hard economic data or other specific evidence demonstrating that their study areas cannot support multiple carriers. The Bureau's public interest findings were sound and should be upheld, notwithstanding unsupported rural ILEC threats that they will, to the detriment of rural consumers, fold up their tents rather than engage in fair competition.

Second, the Bureau appropriately crafted a common-sense resolution of the tension between Section 214(e)(5) requirement that competitive ETCs serve the whole of a rural ILEC's study area, and Sections 214(e)(2) and (e)(6), which require designating commissions to act within jurisdiction limited by state lines even though some rural ILEC study areas lie in multiple states. The Bureau's solution of designating Western Wireless as an ETC in only the Wyoming exchanges of rural ILEC study areas that straddle state lines is consistent with Section 214(e)(6)'s intent that the FCC stand in the shoes of the state commission when designating ETCs. The Bureau's approach is also entitled to the significant deference accorded administrative agency implementations of ambiguous statutes. Alternative approaches offered by the Petitioners would serve only to further delay Western Wireless' designation as an ETC and to continue Petitioners' monopoly status.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
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Western Wireless Corporation Petition for)	
Designation as an Eligible Telecommunications)	
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**WESTERN WIRELESS OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

Western Wireless Corporation, through its wholly-owned subsidiary, WWC Holding Co., Inc. (collectively, "Western Wireless"), was properly designated by the FCC as an eligible telecommunications carrier ("ETC") in the state of Wyoming. 1/ As such, the Commission should reject both the petition for reconsideration of the *Order* filed by Golden West Telephone Cooperative ("Golden West"), Project Telephone Company ("Project"), and Range Telephone Cooperative, Inc. ("Range"), and that filed by Chugwater Telephone Company ("Chugwater"), Range, and RT Communications, Inc. ("RT") (collectively, "Petitioners"). 2/

1/ *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 00-2896 (Com. Car. Bur., rel. Dec. 26, 2000) ("*Order*").

2/ *See* Petition for Reconsideration of Golden West Telephone Cooperative, Project Telephone Company, and Range Telephone Cooperative, Inc. (filed Jan. 25, 2001) ("Golden West Petition"); Petition for Reconsideration and/or Clarification of Chugwater Telephone

I. BACKGROUND

Western Wireless petitioned the Wyoming Public Service Commission (“Wyoming Commission”) on September 1, 1998, for designation as an ETC under Section 214(e)(2) of the Communications Act of 1934, as amended (“Act”), 3/ in order to qualify for federal universal service support in Wyoming. 4/ Nearly a full year later, after significant briefing and over Western Wireless’ ardent opposition, the Wyoming Commission granted a motion to dismiss the petition on jurisdictional grounds, filed by Chugwater, Range, RT, and several other incumbent local exchange carriers (“ILECs”). 5/ In granting the motion, however, the Wyoming Commission noted that its ruling that it lacked jurisdiction over Western Wireless’ petition “does not leave Western Wireless without a forum [as] Section 214(e)(6) of the federal Act expressly provides for FCC jurisdiction in the absence of state commission jurisdiction.” 6/

Company, Range Telephone Cooperative, Inc., and RT Communications, Inc. (filed Jan. 25, 2001) (“Chugwater Petition”).

3/ 47 U.S.C. § 214(e)(2).

4/ Western Wireless Application Seeking Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to Section 214(e)(2) of the Federal Communications Act (filed Sept. 1, 1998).

5/ The Amended Application of WWC Holding Co., Inc. (Western Wireless) for Authority to be Designated as an Eligible Telecommunications Carrier, *Order Granting Motion to Dismiss Amended Application*, Docket No. 70042-TA-98-1 (record No. 4432) (Aug. 13, 1999) (“*Wyoming Order*”).

6/ *Id.* at ¶ 16.

In light of the Wyoming Commission's conclusion that it lacked jurisdiction, Western Wireless filed an ETC petition with the FCC pursuant to Section 214(e)(6), which provides for FCC authority in cases where state commissions lack jurisdiction. Western Wireless' petition described how the company meets each of the criteria required by Section 214(e)(6), and it included a detailed listing of the individual rural ILEC study areas for which ETC designation was sought. ^{7/} Comments were received by all of the Petitioners here through their trade associations, ^{8/} and Western Wireless filed replies to the issues they raised.

The Commission did not immediately act on the petition. Rather, in the *Twelfth Report and Order*, as part of its first significant rulemaking implementing Section 214(e)(6), the Commission determined that it properly had jurisdiction over the petition because Western Wireless had demonstrated that the Wyoming Commission lacked jurisdiction to designate the company as an ETC. ^{9/} The Commission also adopted procedural rules for ETC petitions filed under

^{7/} Western Wireless's petition conformed with what, at the time, was the Commission's sole guidance on ETC petitions filed under Section 214(e)(6), *ETC Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, 12 FCC Rcd 22947 (1997) ("*Section 214(e)(6) Notice*").

^{8/} Golden West, Chugwater, Range and RT are all members of the United States Telecom Association, which filed comments on Western Wireless' Wyoming ETC petition, and all of the foregoing (except Golden West), as well as Project, are members of the Wyoming Telecommunications Association, which also filed comments on the petition.

^{9/} *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, 15 FCC Rcd 12208, 12271-72, ¶¶ 135-137 (2000) ("*Twelfth Report and Order*"). In so doing, the Commission relied heavily on the Wyoming Commission's own disavowal of jurisdiction to rule on Western Wireless' Wyoming ETC petition. *Id.* at 12271, ¶ 135.

Section 214(e)(6), and it committed to resolve the merits of Western Wireless' Wyoming ETC petition within six months of the *Twelfth Report and Order's* release date. 10/ The Commission also delegated authority to the Common Carrier Bureau ("Bureau") to resolve Western Wireless' Wyoming petition and other Section 214(e)(6) petitions.

The Bureau discharged its delegated duty by granting Western Wireless ETC status in Wyoming on December 26, 2000, based on the conclusion that Western Wireless satisfies the requirements of section 214(e). 11/ It held that Western Wireless would "offer and advertise the services supported by the federal universal service support mechanism throughout the designated service areas," and that designation of Western Wireless as an ETC in areas served by rural ILECs would "serve the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming." 12/

The Petitioners now challenge the Bureau's grant of ETC status to Western Wireless in Wyoming. Having successfully forced the company through a year-long proceeding in Wyoming, followed by a full-scale proceeding before the Commission and a follow-on process at the Bureau level, Petitioners now argue that the federal process is flawed, and/or that the Wyoming legislature is on the verge of granting the Wyoming Commission ETC jurisdiction over wireless carriers like

10/ *Id.* at ¶ 94.

11/ *Order* at ¶ 1.

12/ *Id.*

Western Wireless. On this basis, the Petitioners seek the revocation of Western Wireless' ETC status and would send Western Wireless back to the Wyoming Commission to start the process anew. ^{13/} Petitioners also argue that the Bureau acted improperly in determining that bringing the benefits of competition to rural consumers in Wyoming satisfies the public interest requirement in Section 214(e)(2), and/or that the grant of ETC status to Western Wireless is somehow deficient or unclear despite already well-settled FCC universal service policy decisions. These flawed contentions must be emphatically rejected, and the Petitioners should not be allowed to benefit further from two years of delay tactics aimed at thwarting competition in their markets.

II. THE *ORDER* PROPERLY ADHERED TO ALL REQUIRED PROCEDURES AND THEREFORE MUST BE UPHELD

The Commission should reject Petitioners' process-based challenges to the *Order*. First, all parties affected by the FCC grant of ETC status to Western Wireless in Wyoming had ample notice of the contemplated action, and the *Order* was a logical outgrowth of the public notice and pleadings arising out of Western Wireless' ETC petition. In addition, the grant of ETC status to Western Wireless by the Common Carrier Bureau on delegated authority was wholly consistent with statutory mandates and the FCC's rules. Finally the *Order* appropriately complied with the Commission's six-month deadline for acting on ETC designation petitions.

^{13/} Chugwater Petition at 3; Golden West Petition at 9-11.

A. There is No Basis for Petitioners' Allegation of Due Process Violations

The Commission should reject claims that any of the Petitioners were somehow denied due process with respect to the grant of ETC status to Western Wireless for Wyoming. ^{14/} Petitioners' principal argument on this point – that Western Wireless supposedly disclosed the actual study areas affected for the very first time in a December 20, 2000, *ex parte* presentation, ^{15/} leaving Petitioners no opportunity to comment on it – is completely without merit. ^{16/} Western Wireless' original petition identified all of the rural ILEC study areas for which the Bureau granted ETC designation. It is true that the Western Wireless *ex parte* presentation listed all exchanges that fall within the rural ILECs' study areas, but this was submitted just for informational purposes. The issue before the Commission is not the specific exchanges of the rural ILECs, but Western Wireless' requested designated service area, which consists, in part, of the rural ILECs' study areas. The *ex parte* filing merely clarified which specific exchanges are included in the previously-identified study areas. ^{17/}

^{14/} Chugwater Petition at 4; Golden West Petition at 3-4.

^{15/} Letter from David L. Sieradzki, Counsel for Western Wireless Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission (Dec. 20, 2000) (describing and listing specific exchanges in Western Wireless' proposed designated ETC service areas in Wyoming).

^{16/} Petitioners argue that they were denied an opportunity to comment because FCC notice of the *ex parte* contact issued after the *Order* was adopted and released. Golden West Petition at 3; Chugwater Petition at 4.

^{17/} RT is the only ILEC that was identified in the *ex parte* presentation that was not expressly identified in Western's petition. However, by virtue of the fact that it is a wholly-

The Petitioners had more than ample opportunity to take note of the inclusion of their study areas in Western Wireless' petition and to raise arguments about that inclusion when the Commission solicited comment on the petition. As noted above, all of the Petitioners here participated through their trade associations – and could have participated directly – in filing comments on Western Wireless' ETC petition. Moreover, each of these parties was free to submit *ex parte* filings thereafter, as this matter has been classified as “permit-but-disclose” from its inception. Petitioners also had the added advantages of the FCC's discussion of Western Wireless' Wyoming ETC petition in the *Twelfth Report and Order* – including an explicitly announced intent to make a decision by the end of 2000 – as well as the opportunity to become intimately familiar with the scope of Western Wireless' universal service offering during the protracted Wyoming Commission proceedings. Indeed, taking the Wyoming Commission proceeding and the FCC proceeding together, Petitioners have been aware of Western Wireless' plans to provide universal service in their study areas for nearly two-and-a-half years. Petitioners should not now be heard to complain that they lacked knowledge of Western Wireless' possible entry into their study areas as an ETC.

owned subsidiary of Range and shares a common study area with Range, see Golden West Petition at 1 (“Range' refers both to Range Telephone Cooperative and its wholly owned subsidiary RT Communications.”), RT received constructive notice of the issues related to Western's Wyoming ETC petition each time Range received actual notice.

Finally, the Bureau's decision was a logical outgrowth of Western's petition. The petition was properly placed on public notice. 18/ From the moment the petition was made public, any party that examined it, even in the most cursory manner, would have realized that FCC action would impact study areas within the state of Wyoming. Interested parties like the Petitioners, who knew that some of the study areas listed in the petition overlapped state boundaries, would also have logically anticipated that the multi-state study areas would likely be affected by Commission action. 19/ In light of these circumstances, interested parties were in fact satisfactorily notified of the scope of the pending decision. Thus, the Order satisfies well-established administrative procedure standards for notice and due process. 20/

B. The Order was Issued Within the Scope of the Bureau's Delegated Authority

The Commission must likewise reject the Petitioners' baseless claims that deciding Western Wireless' ETC status for Wyoming under delegated authority was improper because it involved a novel question of law. 21/ This claim is entirely

18/ Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Public Notice, CC Docket No. 96-45, DA 99-2511 (rel. Nov. 12, 1999).

19/ See *infra* Section III.B.

20/ See *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000) (holding that final administrative rules do not require special notice as long as the final rules are a logical outgrowth of the proposals such that the parties "should have anticipated [that they] might be imposed.") (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547, 549 (D.C. Cir. 1983)).

21/ Golden West Petition at 11.

at odds with the reality of Western Wireless' request and the resulting *Order*, and with the paradigm expressly established in the *Twelfth Report and Order*. 22/

As a practical matter, every petition before the Commission presents new factual complexities and implementation details such as those presented in this proceeding. It is logical that the Bureau has proper authority to explore and resolve the minute details that result from these types of proceedings. Any other result would mean that the Bureau could virtually never act on delegated authority. This would significantly interfere with the FCC's ability to address its workload.

To be sure, in acting on the instant petition, the Bureau was faced with the question of how to handle competitive entry into rural ILEC study areas that straddle state lines, but this issue was not so wholly unpredictable or unprecedented that the Commission delegated ETC-designation authority in the *Twelfth Report and Order* absent awareness that the issue could possibly arise. Indeed, prior to the issuance of the present *Order*, the Bureau was regularly addressing matters involving the definitions of carriers' study areas in routine petitions for waiver of study area rules. 23/ Such fact-specific, implementation matters are clearly within the scope of the Bureau's delegated authority.

22/ *Twelfth Report and Order*, 15 FCC Rcd at 12257-58, ¶¶ 99-100.

23/ See, e.g., *Valor Telecommunications of Texas, LP and GTE Southwest Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Glossary of the Commission's Rules*, Order, 15 FCC Rcd. 15816 (Com. Car. Bur., rel. Aug. 21, 2000); *Citizens Telecommunications Co. of Nebraska and Qwest Corp. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Glossary of the Commission's Rules*, Order, 15 FCC Rcd. 19368 (Com. Car. Bur., rel. Oct. 3, 2000); *Jordan-Soldier Valley Tel. Co. and Alpine Comm., L.C. Joint Petition for Waiver of the Definition of "Study Area"*

C. The Order Correctly Complied with the Six-Month Deadline Established in the Commission's *Twelfth Report & Order*

The Commission should reject the Chugwater Petition's contention that the *Twelfth Report and Order's* clear mandate to decide Western Wireless' ETC petition for Wyoming within six months should have been disregarded in favor of delaying action pending the uncertain prospect of Wyoming legislation to extend the state commission's jurisdiction to permit designation of wireless ETCs. ^{24/} First, it was the rural ILECs themselves – including Chugwater, Range, and RT – that had argued that the decision on whether to designate Western Wireless as an ETC must be made on the federal level. At that time, as now, there was the prospect of state legislation that would allow the Wyoming Commission to designate Western Wireless. ^{25/} Such legislation has not yet come to pass. In any event, the Wyoming Commission expressly considered waiting for jurisdiction-extending legislation, but determined that the state legislature was not an adequate forum for addressing Western Wireless' entry into the market. ^{26/}

Contained in the Part 36 Glossary of the Commission's Rules, Order, CC Docket No. 96-45 (Com. Car. Bur., rel. Nov. 3, 2000); Citizens Telecommunications Co. of Ill. and GTE South Inc. and GTE North, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Glossary of the Commission's Rules, Order, CC Docket No. 96-45, DA 00-2662 (Com. Car. Bur., rel. Nov. 29, 2000).

^{24/} Chugwater Petition at p. 3. (describing HB0052 as a legislative initiative that would "rectify the inability of the Wyoming Commission to determine and establish ETC designation"). Chugwater proposes that once HB0052 is passed, the FCC should remand the Western Wireless petition to the Wyoming Commission. *Id.*

^{25/} HB0052 has been pending with the Wyoming legislature for some time.

^{26/} *Wyoming Order* at ¶¶ 11-12.

Second, there is no guarantee that the legislation will ever be passed by the Wyoming legislature, or that, if passed, it will be signed into law. It is already two months beyond the deadline established by the *Twelfth Report and Order* for a decision on Western Wireless' Wyoming petition, and the Wyoming law has yet to be placed on the books. As noted above, a similar effort failed as recently a year ago. There was thus no basis for delay in granting Western Wireless the ETC status in Wyoming that it first requested well over two years ago. Petitioners' suggestion that the Commission should have further forestalled action lacks merit. Rather, this argument does little more than reveal Petitioners' true intent in opposing Western Wireless' Wyoming ETC petition and seeking reconsideration of the *Order* – delaying Western Wireless' competitive entry into their markets.

Finally, delaying a decision on whether to grant Western Wireless ETC status in Wyoming, beyond the two-and-a-half years that have passed since it was first requested, would be overwhelmingly contrary to the public interest. The *Order* notes multiple public interest benefits arising from Western Wireless's designation as an ETC to provide competitive universal service in Wyoming. 27/ Delaying the provision of these benefits to consumers in rural Wyoming clearly disserves the public interest. In addition, the Commission has on numerous occasions found that the public interest requires speedy resolution of ETC matters. 28/ Chugwater's suggestion that the Bureau somehow acted inappropriately by deciding Western

27/ *Order* at ¶¶ 16-22.

28/ *E.g., Twelfth Report and Order*, 15 FCC Rcd at 12255, ¶ 94.

Wireless' petition in due course under the rules and consistent with the *Twelfth Report and Order* is without merit and should be rejected.

III. THE SUBSTANCE OF THE ORDER IS WELL-FOUNDED AND MUST BE AFFIRMED

Petitioners' substantive attacks on the *Order* are as unfounded as their procedural challenges, and should likewise be dismissed. First, the Bureau correctly determined that designating Western Wireless as an ETC in those parts of its service area that encompass rural ILEC study areas would serve the public interest. Second, designating Western Wireless as a second ETC only in the Wyoming portion of those rural ILEC study areas that straddle state lines is consistent with Section 214(e)(6). Finally, the generic universal service matters that Petitioners raise are misplaced, and are more appropriately addressed in other proceedings. For these reasons, the petitions for reconsideration must be denied.

A. Designating Western Wireless as a Second ETC in Rural Telephone Company Areas Advances the Public Interest

The *Order's* public interest analysis is valid and should be reaffirmed. The *Order* correctly held that competition itself is a public interest benefit to rural consumers. 29/ The *Order* also correctly noted several other public interest benefits

29/ *Order* at ¶ 22. The Bureau concluded that designation of Western Wireless as an ETC in those areas of Wyoming presently served by rural ILECs serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming. The Bureau specifically rejected "the general argument that rural areas are not capable of sustaining competition for universal service support." *Id.*

arising from Western Wireless' designation as a competitive ETC. 30/ It is notable that no party has challenged or even addressed these other public interest benefits.

Moreover, the apparent argument of the Chugwater Petitioners that the *Order* was incorrectly decided because, as a general matter, the rural ILECs should be protected from competition, should be rejected. 31/ Nothing in the Act or the FCC's rules provide rural ILECs with a special dispensation from competition. Indeed, the Commission has ruled, in the specific context of opening local markets in rural Wyoming to competition, that prohibiting competition in rural areas is an impermissible barrier to entry. 32/ Moreover, the argument implicitly offered by Petitioners here was specifically rejected by the Fifth Circuit in *Alenco*. 33/

To the extent that individual Petitioners argue that their *specific* study areas cannot support competition, their efforts are equally unavailing. The *Order*

30/ *Order* at ¶¶ 21-22 (noting that Western Wireless' universal service will feature expanded local calling areas that make intrastate toll calls more affordable, that Western Wireless will introduce new wireless local loop technology into Wyoming, and that rural ILECs will likely implement new operating efficiencies, lower prices and better service to meet the challenge of competing with Western Wireless).

31/ *Order* at ¶ 22. ("We reject the general argument that rural areas are not capable of sustaining competition for universal service support. We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers.").

32/ *Silver Star Telephone Co., Inc. Petition for Preemption & Declaratory Ruling*, Memorandum Opinion & Order, 13 FCC Rcd 16356 (1998) ("*Silver Star Order*").

33/ *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("[T]he Act does not guarantee all LECs a sufficient return on investment; quite the contrary, it is intended to introduce competition into the market."); *see also id.* (Competition "necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers.").

correctly held that there was no evidence to support this proposition in the rural ILEC study areas for which Western Wireless was designated as a second ETC. The attempted showing of empirical evidence to the contrary by the Chugwater Petitioners here is without merit. First, the proper time for making such showings was when comments were originally solicited on Western Wireless' Wyoming ETC petition. The FCC rules bar the consideration of such evidence at this late date barring a demonstration of why the information could not have been timely provided, 34/ a showing Petitioners fail to even attempt (other than their easily-refuted due process arguments discussed above).

Second, threats in the Chugwater Petition of suspended infrastructure investments and/or raised rates are simply not credible. 35/ Neither bald recitations of a carrier's size, customer base and/or service area, nor general allegations regarding its inability to reduce costs, demonstrates that designation of a competitive ETC will not serve the public interest. 36/ These factors merely

34/ See 47 C.F.R. § 1.1106(c) (petitions for reconsideration relying on facts not previously presented may be granted only if the new facts relate to events which occur or circumstances which have changed since the last opportunity to present evidence, or the new facts were unknown to petitioner until after the last chance to present such matters and could not have been learned earlier through the exercise of ordinary diligence.); *see also* *Armstrong Communications, Inc.*, Order on Reconsideration, 14 FCC Rcd 9521 (Com. Car. Bur. 1999).

35/ Chugwater Petition at 9-19.

36/ *Order* at ¶ 22 ("We reject the general argument that rural areas are not capable of sustaining competition for universal service support. We do not believe that it is self-evident that rural ILECs cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural ILECs will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas.").

demonstrate that the carrier is small, possibly inefficient, and attempting to keep a stranglehold on its monopoly. In fact, such offensive claims are tantamount to the incumbents' placing a gun to their captive consumers' heads, and threatening to pull the trigger if competitive entry is permitted. These contentions demonstrate quite clearly the power of a monopoly carrier, a power that can best be minimized through the market entry by competitive carriers that Chugwater *et al.* seek to prevent. If these claims could be taken at face value, they would only serve to demonstrate the urgent need for competitive alternatives for consumers in these rural service areas. Instead, at this late stage, they serve only as desperate repetition of arguments previously made and properly rejected in the *Order*.

B. Limiting the Designated Service Area to Territory Within the State of Wyoming is Consistent with Section 214(e)(6)

The Golden West Petition suggests that, rather than simply granting Western Wireless ETC status for the parts of such multi-state study areas that lie in Wyoming, “practical options” should have been considered as alternative ways to resolve ETC applications involving rural ILEC study areas that straddle state lines. 37/ This suggestion should be rejected. The Commission's jurisdiction in Section 214(e)(6) cases is limited to that which could have been exercised by a state commission. When acting in place of a state commission to determine a petitioning carrier's ETC status, the FCC “steps into the shoes” of the state commission. 38/ In

37/ Golden West Petition at 9-10.

38/ *Twelfth Report & Order*, 15 FCC Rcd at 12255, ¶ 92.

this case, the Wyoming Commission would not have authority to grant or deny ETC designations outside the state's boundaries. Interestingly enough, the Wyoming Commission apparently granted ETC status in this very manner to this same group of rural ILECs, notwithstanding their multi-state study areas. Likewise, in this case, the actions of the FCC (standing in the shoes of the Wyoming Commission) properly extended only as far as the Wyoming Commission's authority: only within the boundaries of that state.

It is significant that, to our knowledge, none of the state commissions deciding ILEC ETC petitions took any action to disaggregate the rural ILECs' multi-state study areas into components that correspond with state boundaries prior to granting ETC status to the rural ILECs, 39/ nor did the rural ILECs request such treatment for themselves. Yet, the rural ILECs now assert, in the name of "competitive neutrality," that this would be the proper procedure in Western Wireless' case. 40/ Their proposal, which recommends treating the new entrant ETC petitions in a very different and less favorable manner, is profoundly

39/ See, e.g., *Petition by Warwick Valley Tel. Co. for Designation as an Eligible Telecommunications Carrier Under the Telecommunications Act of 1996*, Order of Approval, Docket No. T097080587 (New Jersey Bd. of Public Util., rel. Nov. 25, 1997); *Proceeding on Motion of the Comm'n to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market*, Order Designating Eligible Telecommunications Carriers and Service Areas and Granting Waivers, Case 94-C-0095 (New York Pub. Service Comm'n, rel. Nov. 25, 1997); *U.S. West Communications, Inc.*, Decision No. 60513 (Ariz. Corp. Comm'n, rel. Dec. 18, 1997).

40/ Chugwater Petition at 22-23.

anti-competitive. 41/ Furthermore, if the proposal were to be taken seriously, it would require voiding hundreds of ILECs' ETC designations that are already in place, including those of the Petitioners.

The *Order* capably resolved the tension between Section 214(e)(5), requiring ETCs to serve an entire rural ILEC “study area,” and Sections 214(e)(2) and (e)(6), which require the designating commission to act within jurisdiction that is delimited by state lines notwithstanding study area contours that may lie in more than one state. 42/ It is manifestly logical for the FCC to follow the approach taken by a state commission faced with this very situation, especially since the structure of the Act’s universal service regime relies on a close federal-state partnership. 43/ Indeed, the Bureau’s common-sense resolution of this issue is entitled to significant deference given that, where a statute is ambiguous or rests on factually incorrect assumptions (such as the relationship between state boundaries and rural ILEC

41/ See *Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Comm’n*, Declaratory Ruling, 15 FCC Rcd 15168, ¶ 10 (2000) (“We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC.”); *Silver Star Order*, 13 FCC Rcd at 16360-61, ¶ 10 (“[T]he Commission has consistently construed the term ‘competitively neutral’ as requiring competitive neutrality among the entire universe of participants and potential participants in a market.”).

42/ *Order* at ¶ 24.

43/ See e.g., Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168, Order at 6-7 (Texas Pub. Util. Comm’n, rel. Oct. 2, 2000), cited in *Order* at ¶ 24 n. 72.

study areas), expert administrative agencies must have sufficient leeway to adopt practical solutions. 44/

It is clear that the Golden West Petition's proffer of "alternative possible courses of action" 45/ amounts to little more than a blueprint for additional delay meant to throw Western Wireless back into an administrative morass and, by doing so, to again postpone any competition in rural ILEC study areas. The FCC rules are clearly intended to preclude such chicanery. Rural ILECs with study areas that encompass territory in both Wyoming and other states clearly knew that Western Wireless sought designation only in the portion of those study areas located in Wyoming, yet they failed to raise this issue in their comments in this proceeding prior to issuance of the *Order*. This type of challenge at so late a stage in the proceedings is wholly inappropriate. 46/

In any event, should the FCC choose, it could easily address situations where a rural ILEC study area encompasses multiple states by forbearing from applying Section 214(e)(5) in the circumstances at issue here. Such forbearance is

44/ See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844. ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative agencies.").

45/ Golden West Petition at 9-11.

46/ See *supra* note 34, 47 C.F.R. §1,106(c); see also *Concord Telephone Exchange, Inc.*, 56 RR 2d 653, 656-57 (1984) (holding that a party who has a right to participate in a proceeding before the Commission cannot delay exercising that right until after the Commission has acted and then expect to be allowed to weigh in on a matter by filing post-grant pleadings).

authorized under Section 10 of the Act, which requires the Commission to forbear from applying specific provisions of the Act where:

- (1) enforcement is not necessary to ensure charges, practices, classifications or regulations are just, reasonable, and not unjustly or unreasonably discriminatory;
- (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. 47/

All of the criteria of the forbearance test are met in this instance. The requirement that competitive ETCs serve the whole of a rural ILEC's study area is not intended to ensure just, reasonable and non-discriminatory carrier rates, terms and conditions, so enforcing Section 214(e)(5) in the present case is not necessary under the first criteria. The *Order* already demonstrates how designating Western Wireless as an ETC in rural ILEC study areas in Wyoming will benefit – not harm – consumers, and this calculus would remain unchanged if the Commission were to forbear from enforcing Section 214(e)(5). Finally, the public interest analysis in the *Order* supporting the designation of Western Wireless as an additional ETC in Wyoming's rural ILEC study areas equally supports the third criterion, especially since the *Order's* finding of general benefits arising from competition, standing alone, would be sufficient under Section 10(b). 48/ Thus, while we believe that the

47/ 47 U.S.C. § 160. As to the public interest determination required by Section 10(a)(3), “[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a [] finding that forbearance is in the public interest.” *Id.* § 160(b).

48/ See, e.g., *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion & Order, 13 FCC Rcd 16857 (1998).

practical solution set forth in the *Order* regarding multi-state rural ILEC study areas is sound, there is no basis for rescinding the grant of ETC status in rural ILEC study areas given the FCC's forbearance authority under Section 10 of the Act.

C. The Peripheral Universal Service Matters Raised by the Rural ILECs Are Better Addressed in Other Universal Service Rulemakings

The Commission should resist the efforts of the Chugwater Petitioners to goad it into solving all matters remotely related to universal service in the context of this proceeding. ^{49/} Generic universal service matters are not appropriate for this proceeding, which, by its very nature, is discrete. The FCC currently has several ongoing proceedings where it has solicited comment to assist in its effort to very thoroughly analyze additional aspects of the universal service program. These proceedings include an examination of the Rural Task Force proposal for creating a universal service support system specific to carriers in rural ILEC areas, as well as pending examination of potential changes to the universal service rules applicable to all eligible carriers. ^{50/} The Commission could properly

^{49/} See Chugwater Petition; “clarification is requested as to how the Commission will determine continued eligibility is applicable for Western Wireless.” *Id.* at 5. “clarification is needed as to how certification as outlined in the Commission's Ninth Report & Order ... will be made.” *Id.* at 6. “Consideration should be made by the Commission of what is and is not included in the support that is provided through the Universal Service Fund.” *Id.* at 7. Chugwater also alleges that the Act requires support for advanced services. *Id.* at 12.

^{50/} See, e.g., *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 01-8 (rel. Jan. 12, 2001) seeking comment on *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, FCC 00J-4 (rel. Dec. 22, 2000); *Federal-State Joint Board on Universal Service*, Twelfth Report & Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC

and efficiently address the generic universal service issues raised in the Chugwater Petition in the context of any of these pending universal service notices of proposed rulemaking. This way, petitioners' generic arguments could be considered more appropriately with all of the comments filed therein.

In any event, it would be inappropriate for the Bureau to separately address the multi-faceted contentions that appear to have been raised as a further dilatory tactic, as doing so would only serve to further delay the specific matter at hand. For example, Chugwater's suggestion that the *Order* is somehow deficient because it does not inquire into Western Wireless' ability to provide advanced services is frivolous given that, as even Chugwater admits, ETCs are not required to provide advanced services. ^{51/} Equally frivolous are Chugwater's requests for "clarification." These issues are all generic universal service issues that are irrelevant to the question of whether Western Wireless qualifies as an ETC in Wyoming, and they have no place in this proceeding. Indeed, Western Wireless has already shown that it meets all of the specific statutory and FCC criteria for designation as an ETC, and the petitioners should not be allowed to suggest new, extraneous criteria for the FCC's consideration at this late stage. The Commission

00-208 (rel. June 30, 2000); *Federal-State Joint Board on Universal Service; Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules*, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-359 (rel. Oct. 12, 2000).

^{51/} Chugwater Petition at 12.

should disregard in the context of this reconsideration proceeding Chugwater's attempts to muddy the waters.

IV. CONCLUSION

For the foregoing reasons, Western Wireless respectfully requests that the Commission deny the petitions for reconsideration of the *Order* designating Western Wireless as an ETC in Wyoming.

Respectfully submitted,

**WESTERN WIRELESS
CORPORATION**

By: David Sieradzki

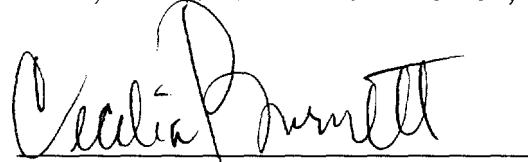
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February 27, 2001

CERTIFICATE OF SERVICE

I, Cecelia Burnett, hereby certify that on this 27th day of February, 2001, a copy of the foregoing "Western Wireless Opposition to Petitions for Reconsideration" were delivered by first class mail, unless otherwise indicated, to the following parties:


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